

MEDIATION STYLES AND TECHNIQUES

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## **THE FACULTY**

- Linda I. Lazarus, Esq. – Chair/Moderator
- Michael K. Lewis, Esq.
- Hon. Carol Park-Conroy
- Hon. Curtis E. von Kann
- Robin C. Douglas, Esq.

# TOPICS

- Facilitative Mediation (Lewis)
- Evaluative Mediation (Park-Conroy)
- Facilitative/Evaluative Mediation (von Kann)
- Transformative Mediation (Douglas)
- Narrative Mediation (Lazarus)
- Meditation (Lazarus)

## **FACILITATIVE MEDIATION**

### **● Mediator Assumptions:**

- The parties understand their own interests (better than the mediator, and perhaps, better than their lawyers, if represented);
- Therefore, the task for the mediator is to harness the creativity of the parties so that they can fashion their own solution;
- The principal mission of the mediator “is to clarify and to enhance communications between the parties in order to help them decide what to do.”

# FACILITATIVE MEDIATION

- **Mediator Strategies:**

The principal strategy is to help the parties define the subject matter of the mediation in terms of underlying interests:

- tries to have parties in interest participate in the mediation
- encourages those parties to voice their underlying interests, using both joint and separate sessions
- helps the parties develop broad interest-based options for resolution, if at all possible
- helps the parties evaluate the options for settlement that are developed, primarily by asking questions focused on the interests enunciated by the parties – comparing those possibilities for resolution with the non-resolution alternatives, when appropriate.

## **FACILITATIVE MEDIATION – STAGES OF MEDIATION**

- **INTRODUCTION**

**Mediator emphasizes the role of the parties in a) explaining interests and priorities, b) developing options responsive to those interests (and those of the other side) and c) making decisions about resolution.**

## **FACILITATIVE MEDIATION – STAGES OF MEDIATION**

- **UNDERSTANDING INTERESTS AND PRIORITIES**

- Mediator focuses on getting parties to get beyond the positions they may have started with in an effort to focus their attention on underlying interests.
- If a party has more than one interest, the mediator may spend some time trying to get the party to place those interests in priority order.

## **FACILITATIVE MEDIATION – STAGES OF MEDIATION**

- **DEVELOPING OPTIONS**

**based on the interests articulated by the parties, the mediator attempts to engage them in a discussion of possible alternatives for resolution. This discussion might take place in a joint or in separate sessions.**



## **FACILITATIVE MEDIATION – STAGES OF MEDIATION**

- **NARROWING FROM AMONG THE OPTIONS DEVELOPED**

Continuing to focus primarily on the parties' interests, the mediator typically will raise questions about how a particular alternative for resolution meshes with the articulated interests of the parties. This questioning may, on occasion, result in a party reordering its priorities.

## **FACILITATIVE MEDIATION – STAGES OF MEDIATION**

- **CLOSURE**

## **EVALUATIVE MEDIATION**

- Mediator has expertise in substantive legal matters in dispute
- Parties structure process and procedures with mediator assistance
- Mediator meets with parties in joint educational sessions and separate caucuses as appropriate
- Principals with authority to settle must be present

## **EVALUATIVE MEDIATION**

- Mediator engages in candid discussion and evaluation of issues in caucuses with emphasis on weaknesses and litigation risk, not outcome prediction
- Mediator helps parties negotiate settlement

## **FACILITATIVE/EVALUATIVE MEDIATION**

- Most mediations combine facilitative and evaluative elements. The real question is not whether to evaluate but how, when, on what subjects, and for what purpose. It is best to ascertain or develop a consensus among the parties on these issues before the mediation convenes. Evaluation should not be thrust upon unreceptive parties.

## FACILITATIVE/EVALUATIVE MEDIATION

- **Informal Evaluation** can occur throughout a mediation via, for example, “reality testing”
- questions such as:
  - Why do you think the jury will believe your one witness rather than their five?
  - Have you seen many cases in this court granting summary judgment on those grounds?
  - Do you know of any verdicts that large in this jurisdiction on similar facts?

## FACILITATIVE/EVALUATIVE MEDIATION

- **More Formal Evaluation** can occur in joint or separate sessions in various ways and at different points in the mediation. For example:
  - **Intermittent evaluation**: As the mediation unfolds, the mediator can point out, with varying degrees of force, possible weaknesses in the position of a party who is reluctant to move into more realistic terrain. (Some mediators prepare in advance a list of such “leverage points” to be dolled out sparingly and as needed while the mediation progresses.)
  - **Threshold evaluation**: Sometimes parties will ask the mediator to evaluate at the outset of the mediation a critical issue, whose sharply divergent assessment by the parties is keeping them from coming together, after which the mediator will proceed to conduct a largely facilitative mediation.

## FACILITATIVE/EVALUATIVE MEDIATION

- More formal evaluation (cont'd):
  - **Mediator's Proposal**: If parties reach impasse through facilitative mediation, they may wish to have the mediator present a Mediator's Proposal for settlement. The usual practice is for the mediator to present this proposal to the parties at the same time, orally or in writing, and then require that they separately advise the mediator within a specified time of whether or not they will accept the proposal. If all parties accept it, the case is deemed settled on those terms. If less than all the parties accept the proposal, the mediator simply advises that the Proposal was not unanimously accepted, without disclosing whether any party accepted it. (This non-disclosure protects the party who was willing to compromise from having the non-compromising party know it was willing to move to the mediator's number.) When a Mediator's Proposal is not accepted, the mediator may declare the mediation over (which sometimes jolts stubborn parties into greater flexibility), or may recess the mediation to give everyone a break, or may suggest new steps to bring about resolution, or may encourage a dialog and brainstorming with the parties regarding what should happen next.



## FACILITATIVE/EVALUATIVE MEDIATION

- More formal mediation (cont'd):
  - “**Binding Mediation**”: This term, really an oxymoron, refers to the situation in which the the parties, determined to have a resolution, agree that if they have not reached agreement within a specified period, then the mediator shall have authority to issue a final and binding decision on what monetary amount, between pre-agreed high and low numbers, shall be paid in settlement.

## FACILITATIVE/EVALUATIVE MEDIATION

- Examples of Facilitative/Evaluative Mediation –

- **Evaluation of a Threshold Legal Issue:**

In a Superfund cleanup cost allocation case involving ten large chemical companies, all parties agreed that no progress could be made until the mediator evaluated the chances that one of the parties could avoid liability all together on grounds that it was not liable for pollution caused by a predecessor entity. The issue was formally briefed and argued. The next day, the mediator rendered and explained his (purely advisory) opinion that there was a high likelihood that successor liability would be imposed on the party in question. All parties accepted that premise for purposes of the mediation and proceeded, through largely facilitative mediation, to reach an agreement for allocation of the \$40 million in cleanup costs.

## FACILITATIVE/EVALUATIVE MEDIATION

- Examples of Facilitative/Evaluative Mediation –

- **Evaluation Following Impasse:**

- In a legal malpractice case where liability and damages were hotly contested, the parties were unable to bridge the gap in their offers through purely facilitative mediation. The parties requested and received from the mediator private evaluations regarding the strengths and weaknesses of their respective cases. Exchanges of revised settlement offers and counteroffers soon brought about a settlement.

## FACILITATIVE/EVALUATIVE MEDIATION

- Examples of Facilitative/Evaluative Mediation –

- **Mediator's Proposal Following Impasse:** In a case seeking \$25 million in damages for alleged fraud by sellers in the leveraged buyout of a software company, the parties had very different expectations of what the key employees from each company would say happened. Each side was unwilling to expose its witnesses to interview by opposing counsel since the case was about to go into a major arbitration if settlement could not be reached. The mediator then proposed that he interview confidentially three witness from each company, evaluate their testimony, and make a Mediator's Proposal to both sides. The parties readily agreed, the interviews were conducted a few days later, after which the the mediator made a Mediator's Proposal which was unanimously accepted within 48 hours.

## FACILITATIVE/EVALUATIVE MEDIATION

- Examples of Facilitative/Evaluative Mediation –

- **Binding Mediation:** In a case in which an insured suffered business losses of \$450 million and demanded the full policy limits (\$50 million) from its primary layer insurer, that insurer denied coverage and offered nothing. The parties thus began mediation with a \$50 million gap. Through facilitative mediation using bracketed moves (“If they go to \$47 million, will you go to \$5 Million?”), the gap was closed to \$4 million. Both sides wanted to settle but refused to move further and recognized that a face-saving exit strategy was needed. At the mediator’s suggestion, both parties agreed to give the mediator authority to make a binding selection of a settlement number between \$32 and \$36 Million. The mediator selected \$34,500,000, and the case promptly settled.

## **TRANSFORMATIVE MEDIATION**

- Transformative mediation is based on the transformative theory of conflict. According to this theory, conflict is a crisis in human interaction in which the parties need help in overcoming the crisis and restoring constructive interaction. Transformative mediation assumes that people have the capacity to solve their own problems given the right environment and support. As a result, the transformative mediator's goal is to support opportunities for empowerment and recognition between the parties and changing the quality of the conflict situation.

## **TRANSFORMATIVE MEDIATION**

- Transformative mediation is a process in which the third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they discuss and explore various topics and possibilities for resolution.

## **TRANSFORMATIVE MEDIATION**

- What about settlement? In the transformative model the parties define a successful resolution, in their own terms, to include more than settlement or something other than settlement. Settlement is one of the many choices that might be open to the parties as an incidental benefit of improved interaction. The transformative mediator's goal should not be settlement focused. A settlement-focused mediator tends to overlook or ignore opportunities for empowerment and recognition.



## **TRANSFORMATIVE MEDIATION**

- Examples (see PDF document) –
  - Phoenix Feelgoods
  - Union Conversion

## **TRANSFORMATIVE MEDIATION**

- In transformative practice the mediator's job is to microfocus on the interaction between the parties in real time. The mediator is required to attend to the parties by paying close attention to the unfolding conversation in order to identify opportunities for empowerment and recognition as they arise. The transformative mediator should respond, when appropriate, only to support the parties' own efforts to make positive shifts in their interaction.

## **NARRATIVE MEDIATION**

- Very useful in high conflict situations where there is an on-going relationship between the parties, including:
  - Healthcare
  - Divorce
  - Employment conflicts

## **NARRATIVE MEDIATION**

- Focus on the stories we tell about ourselves.
- Help parties create a new story to resolve conflict and move forward into a new relationship.

## **NARRATIVE MEDIATION**

- Techniques include:
  - curiosity
  - developing the externalizing conversation
  - relative influence questioning
  - re-storying practices

## **MEDIATION and MEDITATION**

- Useful for mediators to meditate.
- Meditation helps develop:
  - flexibility
  - attentiveness
  - ability to be fully present  
("in the moment")

# **MEDIATION and MEDITATION**

- Scientific evidence confirms that meditation:
  - induces relaxation response  
(decreasing stress hormones, blood pressure and pulse rate)
  - increases mental tranquility
  - improves perceptual abilities
  - promotes detached neutrality
  - helps transform destructive emotions

## **MEDIATION and MEDITATION**

- Starting is simple: sit and pay attention to your breathing.